SOO CHOW LAI

v.

TAN AH TONG & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MOHD HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3(S4)-22-(F60-1981)]
17 FEBRUARY 2004

LIMITATION: *Enforcement of judgment - Interlocutory application by plaintiff for delivery of issue document of title in respect of certain land - Whether present application a fresh action or a consequential proceeding towards enforcing judgment - Whether application time-barred - Effect of an earlier application filed by plaintiff within limitation period - Limitation Act 1953, s. 6(3)*

WORDS & PHRASES: *"action" - Limitation Act 1953, s. 6(3) - Interpretation of*

This summons in chambers (encl. 65) was an interlocutory application by the plaintiff seeking an order of the court to the 2nd defendant to deliver to the plaintiff the original issue document of title in respect of a particular piece of subdivided land upon payment by the plaintiff to the 2nd defendant of the sum due as full and final settlement of the purchase of the said land by the plaintiff from the 1st defendant pursuant to a sale and purchase agreement. The plaintiff had, in August 1982, obtained an order from the court for specific performance against the 1st defendant by reason of default on the part of the 1st defendant to perform his promise under the said sale and purchase agreement; the defendant failed to comply with the court order. In opposing encl. 65, the 1st defendant submitted that the order for specific performance, by virtue of s. 6(3) of the Limitation Act 1953 ('the Act'), had lapsed after a period of 12 years on 17 August 1994, and that encl. 65, an "action" upon a judgment by virtue of s. 2 of the Act, was only filed in April 2003.

Held (allowing the application):

[1] The definition of the word "action" in the Act is not a true definition because it does not begin with the words "action means …" but "action includes", and coupled with the presence of the words "… any other proceeding" means that the word "action" in s. 6(3) of the Act has a wide meaning. Nevertheless, this court accepts the plaintiff's submission that s. 6(3) of the Act only bars an "action upon any judgment" (should there

be a delay of more than 12 years) and that the interlocutory application at encl. 65 was not a fresh action but a consequential proceeding towards enforcing the 1982 judgment. (p 58 b-d)

[2] Assuming that the word "action" in s. 6(3) of the Act should be given a wide interpretation so as to include any step in the proceeding taken by the plaintiff towards enforcing the 1982 order (such as the application *vide* encl. 65), before the expiry of the 12-year period on 17 August 1994, the plaintiff, for the purpose of enforcing the 1982 judgment, had, on 1 November 1993, filed an application for an extension of time to issue a summons to proceed. An extension order was granted accordingly on 13 January 1996. Thus, the fact that since that application was filed well within the 12-year period, there was no question of the plaintiff taking steps to enforce the order 12 years after the 1982 judgment. Once the plaintiff had filed that application, time that had been running since August 1982 came to a stop. (pp 59 c-f & 60 b)

Case(s) referred to:

Koperasi Pembangunan Desa v. Merotai Setia Maju Enterprise [2003] 5 CLJ 298 HC ***(foll)***

Lowsley & Anor v. Forbes [1998] 3 All ER 897 ***(refd)***

Re Lim Ah Hee; ex p Perwira Affin Bank Bhd [2000] 3 CLJ 354 HC ***(foll)***

Legislation referred to:

Limitation Act 1953, ss. 2, 6(3)

Rules of the High Court 1980, O. 32, O. 92 r. 4

Limitation Act 1980 [UK], s. 24

For the plaintiff - Balbir Singh; M/s AB Teoh & Co

For the 1st defendant - M Lavendran; M/s Ngeow & Tan

Reported by Suresh Nathan

JUDGMENT

Mohd Hishamudin Yunus J:

This summons in chambers (encl. 65) is an interlocutory application by the plaintiff seeking the court to order the second defendant bank to deliver to the plaintiff the original Issue Document of Title in respect of a particular piece of subdivided land in Mukim Ulu Kelang, Selangor, upon payment by the plaintiff to the 2nd defendant a sum of RM29,675 due from the plaintiff to the 1st defendant as full and final settlement of the purchase of the said land by the plaintiff from the 1st defendant pursuant to a sale and purchase agreement made between the plaintiff and the 1st defendant in October 1979.

There is a further prayer to empower the Registrar of this Court to sign the necessary documents or instruments to effect the registration of the transfer of the said land to the name of the plaintiff.

This application is pursuant to O. 32 and O. 92 r. 4 of the Rules of the High Court 1980.

This application is opposed by the 1st defendant. But it is not opposed by the 2nd defendant, the party on whom the order sought is directed at.

I have granted the application with costs against the 1st defendant.

I shall now state the grounds of my decision.

I have no reason whatsoever to refuse the application. On the contrary, justice would be served in granting the application. This is because way back in August 1982 the plaintiff had obtained an order for specific performance against the 1st defendant by reason of default on the part of the 1st defendant to perform his promise under the sale and purchase agreement of October 1979 mentioned earlier at beginning of this judgment, and the 1st defendant had failed to comply with the court order.

Pursuant to the said sale and purchase agreement, the plaintiff had already paid the 1st defendant RM15,000. There is a balance sum of RM29,675 yet to be paid to the 1st defendant.

At the time the plaintiff and the 1st defendant entered into the sale and purchase agreement, there was only the master title, EMR 2146. The 1st defendant had divided the land EMR 2146 into several lots and had sold the lots individually to various persons, including the plaintiff. But at the time of the sale and purchase agreement in 1979 there was yet no separate subdivided titles issued in respect of the lots sold to the respective purchasers. Under the sale and purchase agreement, the obligation was on the part of the 1st defendant cum vendor to take the necessary steps to obtain the subdivided titles from the State Authority. The court order of 18 August 1982 made clear that the property would only be conveyed to the plaintiff when the 1st defendant had obtained the subdivided title. The court order further ordered an inquiry to be held to determine:

> … whether a good document of title can be made to the property in the said agreement mentioned.

The original Issue Document of Title (or "IDT") of the subdivided title was subsequently issued by the Land Office in August 1983. It bears the new subdivided title number H.S (M) 1700, P.T. 2246. The plaintiff, however, was unaware of the issuance. But the 1st defendant, being the party applying for the issuance of the subdivided titles, was aware. But the 1st defendant, however, did not inform the plaintiff of the issuance of the original IDT, nor did he hand over this original IDT to the plaintiff in exchange for the payment by the plaintiff to him of the balance sum, as required of him under the order of 1982. Instead, the endorsement on the original IDT, as exhibited, shows that the land was charged to the 2nd defendant. However, it is not clear from the affidavit evidence as to when this charge was registered.

Subsequently, however, in or about 1998 the plaintiff came to know that the original IDT was in the custody of the Affin Bank Berhad; and, accordingly, an interlocutory application was filed by the plaintiff to add the bank as a defendant to the proceeding.

And having made Affin Bank Berhad as the 2nd defendant, the plaintiff proceeded to file the present encl. 65 in April 2003.

Now, as noted above, despite the order of specific performance issued by the court in 1982, the 1st defendant took no step to complete the sale transaction. In fact, since the order of specific performance, the 1st defendant has been defiance of several subsequent orders of this court. For example, the 1st defendant had failed to appear in court for cross-examination on 14 August 1997 pursuant to the Summons to Proceed, or to disclose to the plaintiff as to the whereabouts of the original Issue Document of Title, despite being ordered to do so by the court.

In opposing the present application, the 1st defendant relies on s. 6(3) of the Limitation Act 1953 which provides:

> 6. (3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable …

The 1st defendant points out that the order for specific performance was made in August 1982, and submits that this order lapsed after 12 years, that is, it lapsed on 17 August 1994. The learned counsel for the 1st defendant argues that the interlocutory application at encl. 65, was filed only in April 2003, that is, long after the 12-year period. Learned counsel contends that encl. 65 is "an action" upon a judgment (the August 1982 order) by virtue of the definition of "action" in s. 2 of the Limitation Act which states:

> "action" includes a suit or any other proceeding in a court of law.

Counsel stresses on the words "… any other proceeding …" and submits that encl. 65, though not a suit, nonetheless, is a proceeding.

The plaintiff, on the other hand, submits that s. 6(3) only bars an "action upon any judgment" (should there be a delay of more than 12 years). The learned counsel for the plaintiff argues that "action upon any judgment" means a fresh action, whereas the interlocutory application at encl. 65 is not a fresh action but a consequential proceeding towards enforcing the 1982 judgment. The plaintiff relies on *Re Lim Ah Hee; ex parte Perwira Affin Bank Bhd* [2000] 3 CLJ 354.

Does the word 'action' in s. 6(3) include an interlocutory application such as encl. 65? In considering this question, it is quite pertinent to note that the definition of the word "action" in the Limitation Act is not a true definition because it begins not with the word 'means' (in other words, the definition does not begin as '"action" means …') but with the word 'includes'. This fact coupled with the presence of the words '… any other proceeding …' means that the word 'action' in s. 6(3) has a wide meaning.

Bearing the above in mind, nevertheless, with respect to learned counsel for the 1st defendant, I accept the plaintiff's submission. In *Lim Ah Lee*, the Court of Appeal in interpreting the word "action" in s. 6(3) of the Limitation Act, after referring, with approval, to the decision of the House of Lords in *Lowsley & Anor v. Forbes (t/a LE Design Services)* [1998] 3 All ER 897, said:

> It was held by the House of Lords that on its true construction, the word 'action' in s. 24(1) of the 1980 Act means a fresh action, and did not include proceeding by way of execution. Accordingly, the section did not bar execution of a judgment after six years, but only barred the bringing of a fresh action on the judgment.

Lowsley was concerned with the interpretation of s. 24 of the English Limitation Act 1980 which provides as follows:

(1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.

(2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

I am, however, aware that the facts in *Lim Ah Hee* are quite different from the facts of the present case in several aspects. First, that case concerned a bankruptcy proceeding. Second, the Court of Appeal in that case did not consider the definition of 'action' in the Limitation Act; and, thirdly, that case was not concerned with the enforcement of a judgment decreeing specific performance but rather with a claim on interest on a judgment debt.

Assuming that I am wrong in my above view on the meaning of 'action' in s. 6(3), and that the word 'action' in that section should be given a wide interpretation so as to include any step in the proceeding taken by the plaintiff towards enforcing the 1982 order, such as the application *vide* encl. 65, I, however, wish to add in the alternative that, in any event, before the expiry of the twelve-year period on 17 August 1994, the plaintiff, for the purpose of enforcing the 1982 judgment, had, on 1 November 1993, filed an application for an extension of time to issue a Summons to Proceed; and an extension order was granted accordingly on 13 January 1996. Pursuant to this order, the Summons to Proceed was filed by the plaintiff on 13 February 1996 and an order in terms was granted by the court on 16 May 1997. There was no appeal by the 1st defendant either in respect of the order of 13 January 1996 granting the extension of time, or in respect of the order of 16 May 1997 pursuant to the Summons to Proceed. Nor was the issue of limitation raised then by the 1st defendant.

Thus based on the above facts, in particular, the fact that the application for an extension of time to file the Summons to Proceed was filed well within the 12-year period, there is no question of the plaintiff taking steps to enforce the order after 12 years after the 1982 judgment. The question is not when was encl. 65 filed, as posed by the 1st defendant. The question should be: when was the application for an extension of time to issue a Summons to Proceed filed. In *Koperasi Pembangunan Desa v. Merotai Setia Maju Enterprise* [2003] 5 CLJ 298, Richard Malanjum J (as he then was) held:

> I will deal first, whether the application of the plaintiffs is in fact statute barred. From the facts of this case as given above and taking a simplistic approach, it is plain that the plaintiffs did apply to execute on the judgment as early as 1987 followed by a second application in 1993 and a third application in 1999. There was no hearing for a number of years as the court docket was missing. I am inclined therefore to agree with the contention of learned counsel for the plaintiffs that in view of the application being made

a by the plaintiffs before the 12 years limitation period, there should be no question of applying any of the provisions of the Ordinance since time would have stopped running once the application was filed and in this case in 1987 as well as in 1993.

b Likewise, in the present case, once the plaintiff had filed the application for an extension of time to file the Summons to Proceed in November 1993, time that had been running since August 1982 came to a stop.

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